164-49

164-49

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No 530.

THE UNITED STATES, APPELLANT,

vs.

EDWARD KURTZ.

APPEAL FROM THE COURT OF CLAIMS.

FILED MAY 22, 1896.

(16307.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 530.

THE UNITED STATES, APPELLANT,

vs.

EDWARD KURTZ.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the Court of Claims.

EDWARD KURTZ
vs.
THE UNITED STATES. } No. 18704.

I.—*Petition. Filed December 11, 1894.*

To the Honorable Judges of the Court of Claims:

Your petitioner, Edward Kurtz, a citizen of the United States, and a resident of Milwaukee, in the State of Wisconsin, respectfully shows:

That from the 1st day of July, 1888, to the 30th day of June, 1894, he was clerk of the United States circuit and district courts, and from Dec. 11, 1888, to June 30, 1894, he was a commissioner of the circuit court of the United States for the eastern district of Wisconsin duly qualified, and acted as said clerk and commissioner.

That your petitioner presented to the accounting officers of the
2 Treasury for payment his accounts for services as said clerk from the 1st day of July, 1891, to the 30th day of June, 1894, and his accounts for services as said commissioner from the 11th day of December, 1888, to the 30th day of June, 1894, sworn to and duly approved by the court, as required by the act of February 22, 1875 (18 Stat. L., 333); that in the settlement of said accounts the accounting officers disallowed and refused payment of fees for the following services, as per Exhibit A herewith attached and made a part of this petition.

Petitioner claims that, in accordance with the provisions of sections 828 and 847 of the Revised Statutes of the United States, he is entitled to be paid by the United States for each of the services performed by him as aforesaid, and approved and allowed by the court; and though his accounts therefor have been duly presented to the accounting officers of the *the* Treasury for payment of said fees, and although payment of the same has been repeatedly demanded, yet no part of the same has been paid to him, nor to anyone for him, nor has any part of the same been allowed to him in any way, as a credit or set-off, by any officer or department of the United States; but, on the contrary, allowance and payment thereof has been refused, although his accounts therefor were duly presented to and approved by said court in accordance with law.

Your petitioner further avers that no assignment or transfer of said claim, or any part thereof, has been made by him, and that he is the lawful owner thereof; that his whole compensation as clerk, if said fees were added, would not exceed the maximum compensation of $7,000 for any one year.

3 Wherefore your petitioner prays judgment against the defendant for $410.00.

EDWARD KURTZ.
By his attorney, CHARLES C. LANCASTER,
Washington, D. C.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Before me, a notary public in and for the District of Columbia, personally appeared Charles C. Lancaster, who being duly sworn deposes

and says that he is the attorney for the petitioner named in the foregoing petition, and that he is authorized by warrant of attorney, duly executed by said petitioner and filed herewith, to verify said petition, and petitioner is justly entitled to the amount therein claimed from the United States, after allowing all just credits and set-offs, and that the facts therein stated are true to the best of his knowledge and belief.

CHARLES C. LANCASTER.

Subscribed and sworn to before me this 10th day of December, 1894.

[SEAL.] GEORGE WM. RITTER,
Notary Public.

4 EXHIBIT A.

THE UNITED STATES OF AMERICA, Dr., to EDWARD KURTZ, a commissioner of the circuit court and clerk of the district and circuit courts of the United States for the eastern district of Wisconsin, for services rendered on behalf of the United States, to wit:

Fees of Commissioner from December 11, 1888, to June 30, 1894.

Item 1:

No. 112915, drawing complaints, at 15 cts. per fol	.....	$1.20
114466, " " "	.....	.45
123542, " " "	.....	5.10
		86.75

Item 2. Making and entering separate orders, at 15 cents per folio:

No. 153650, orders for release and fixing bail	.....	$2.70
153651, order for release	.....	.15
156130, order for release and fixing bail	.....	.30
156131, same	.....	1.20
158970, order for release of defendant	.....	1.20
		85.55

Item 3. Copies of process made with other papers to file in clerk's office:

No. 153650	.....	$1.00

Item 4. Per diem for hearing and deciding on criminal charge for February 28, 1889, disallowed as same day was charged as clerk for attendance on court:

No. 114466	.....	$5.00

Item 5. Per diems for hearing and deciding on criminal charges where the proceedings consisted of taking bail of defendants for court, 19 days, at $5 per day:

5

No. 153650, U. S. vs. Adelle Leard	.....	$5.00
" " David Hill	.....	5.00
" " Frederick Gotey	.....	5.00
" " Jerome Naylor	.....	5.00
" " Jonas Schuyler	.....	5.00

Item 5—Continued.

No. 153651, U. S. vs. E. Cross			$5.00
156130, " " Geo. Lindenborn			5.00
156131, " " Wallace Tokenigo			5.00
" " Wm. Katzenmeyer			5.00
" " Jonas Danforth			5.00
" " Dennis T. Turkey			5.00
158970, " " Lewis Woodman			5.00
" " Mitchell Makimetas			5.00
" " Simon Metoxen			5.00
" " Abe Brunette			5.00
" " Henry House			5.00
" " James King			5.00
" " Simon Antone			5.00
" " George Church			5.00
			$95.00

Fees of clerk from July 1, 1891, to June 30, 1894.

Item 6. Filing bills of cost (made and filed pursuant to sec. 983, R. S.), at 10 cents each:

No. 136709, filing	23	"	"	$2.30
138681, "	16	"	"	1.60
140482, "	1	"	"	.10
140483, "	1	"	"	.10
142791, "	17	"	"	1.70
144999, "	1	"	"	.10
145002, "	23	"	"	2.30
				$8.20

Item 7. For making final record in criminal cases, at 15 cents per folio:

6	No. 131941, U. S. vs. Kuentzel			$ .15
	131941, arraingment and sentence			.30
	134169, "	"		6.75
	136709, "	"		19.05
	136709, "	"		10.65
	138681, "	"		11.70
	138681, "	"		6.00
	140482, "	"		.75
	140483, "	"		6.15
	142791, "	"		15.45
	145002, balance	"		14.40
	147793, $19.95 less $11.85,	"		8.10
	150229, item 4, 30 cents	"		
	" 5, 30 "	"		.60
	152900, $19.65 less $7.60,	"		12.05
				$112.10

Item 8. Oaths to defendants' witnesses (at trials), at 10 cents each:

No. 145002	$1.10
147793	1.40
152900	.40
156258	.40
159023	.60
	$3.90

Item 9. Oaths to jurors on their voir dire, at 10 cents each:

No. 152900	$1.20
156258	1.20
	$2.40

Item 10. Recording memorial to Judge Gilson, pursuant to order of court, 16 folios, at 15 cents a folio:

No. 142707	$2.40

Item 11. Fees for dockets, indexes, and taxing costs in cases where issue was first joined by entering plea of not guilty, and afterwards withdrawn and plea of guilty entered, at $2.00 each, $1.00 now claimed:

7

No. 134169		$1.00
138681		1.00
145002	$1.00	7.00
145002	6.00	
147793		7.00
156258		2.00
159023		2.00
		$20.00

Item 12. For entering separate orders and entries on court journal, at 15 cents per folio:

No. 134169,	"	"	$3.45
136709,	"	"	$9.30
"	"	"	3.60
"	"	"	.30
"	"	"	.15
			13.35
138681,	"	"	1.95
"	"	"	3.65
			5.60
140482,	"	"	.15
142791, item 1,	"	"	.30
" " 2,	"	"	.15
" " 3,	"	"	.15
" " 4,	"	"	.30
" " 5,	"	"	.30
" " 6,	"	"	2.25
" " 9,	"	"	1.95
			5.40

Item 12—Continued.

	No. 145002, item 3,	"	"	"	$3.30		
	" " 5,	"	"	"	.75		
	" " 6,	"	"	"	.75		
	" " 8,	"	"	"	.45		
	" " 12,	"	"	"	.45		
							$5.70
	147721, " 1,	"	"	"	.40		
	" " 5,	"	"	"	.15		
							.55
8	No. 147793, " 8	"	"	"	.15		
	" " 11	"	"	"	.15		
	" " 12	"	"	"	8.10		
							8.40
	150229, " 1	"	"	"	.30		
	" " 5	"	"	"	.30		
							.60
	152900, $19.65 less $12.05		"	"			7.60
	156258,		"	"			13.50
	159023,		"	"			13.95
							$78.25

Item 13. For making lists of jurors with their residences as drawn, at 15 cents per folio:

No. 144999,	"	"	"	.90	
147721,	"	"	"	.55	
147793,	"	"	"	.45	
155728,	"	"	"	.45	
156258,	"	"	"	.45	
					$2.80

Item 14. Balance for making judgment roll, 4 folios, at 15 cents:

No. 144999 ..... $.60

Item 15. Entering order as to disposition of fine, 7 cases, 1 folio each, at 15 cents:

No. 131941 ..... $1.05

Item 16. Filing duplicate certificates of deposit for fine, at 10 cents each:

No. 131941, filing eight	"	"	$ 80		
136681, " two	"	"	20		
138681, " three	"	"	30		
					$1.30

Item 17. Issuing separate warrants of arrest for defendants in separate cases:

No. 159023 ..... $19.00

Item 18. Issuing commitments, making copies, &c.:

No. 159023 ..... $37.00

Item 19. Filing papers from commissioners, at 10 cents each:

No. 159023 ..... $8.30

Total amount claimed $410.60

9 II.—*Traverse. Filed April 15, 1896.*

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

J. E. DODGE,
Assistant Attorney-General.

10 III.—*Findings of fact and conclusions of law. Filed April 27, 1896.*

This case having been heard by the Court of Claims, the court upon the evidence find the facts to be as follows:

I.

The claimant, Edward Kurtz, was a commissioner of the circuit court of the United States for the eastern district of Wisconsin from December 11, 1888, to June 30, 1894, and clerk of the district and circuit courts for said district from July 1, 1891, to June 30, duly qualified and acting.

II.

During said period he made up his accounts for services rendered on behalf of the United States, duly verified, and presented them to the United States court for approval in the presence of the district attorney, and orders approving the same as being just and according to law were entered of record. Said accounts were then presented to the accounting officers of the Treasury Department for payment. Part was paid, but payment of items embraced in Finding III was refused.

III.

FEES OF COMMISSIONER.

Item 1. For drawing complaints of affiants on which to issue warrants of arrest, two folios each, at 20 cents per folio.....	$9. 15
The State law requires complaints to be in writing.	
Item 2. For making and entering orders on the recognizance or mittimus in the hands of the marshal for his authority to release the defendant or for fixing bail, one folio in each case, at 15 cents per folio.....	$5. 55
The marshal required the order as his authority to release the prisoner.	

Item 3. For making copies of process to file in clerk's office in cases where defendants were held for court, at 10 cents per folio $1.00

Item 4. Per diem for examination and certificate in case of application for discharge of a poor convict under section 1042, Rev. Stats., February 28, 1889, at $5.00 per day.... $5.00

This per diem was disallowed, as a per diem for the same day was charged and allowed for attendance on court as clerk.

Item 5. Per diems for hearing and deciding on criminal charges in sixteen separate cases where the proceedings consisted of taking bail and passing on the sufficiency thereof, after the case had been heard and decided by claimant and defendant committed to jail, and in three separate cases where the proceedings consisted of taking bail and passing on the sufficiency thereof where the defendants had been arrested on bench warrants after indictment and brought before claimant to take bail, 19 days, at $5.00 per day..... $95.00

11 FEES OF CLERK.

Item 6. For filing 82 bills of costs in various cases, made and filed pursuant to section 983, Rev. Stats., at 10 cents each..... $8.20

Item 7. For recording in the final record books the entries and proceedings in various criminal cases, consisting of the indictment or information, warrants, recognizances, judgments, and other proceedings, as required by rule of court, at 15 cents per folio..... $112.10

The rule of court specifically directing and by virtue of which this service was performed, is as follows:

"District court of the United States for the eastern district *district* of Wisconsin.

"Before the Honorable James G. Jenkins, judge of said court, November 3, 1890.

"There shall be kept by the clerk, as heretofore, a criminal final record-book, in which shall be recorded the indictment or information and all recognizances, warrants, process (except writs of subpœna and proceedings thereunder), judgments, and other proceedings in every prosecution for violations of the criminal laws of the United States."

That in said final record the claimant has copied and recorded at large all orders and judgments made by the court, all of which orders, judgments, and directions of the court are from day to day recorded by him in another book, known as the "journal."

That included in the services covered by said item 7 are three classes, viz:

(a) Disallowances of all charges for making final records in cases where a nolle prosequi was entered, for the reason that such record is deemed unnecessary..... $25.05

(b) Disallowances of all charges for recording in the final record-book orders, directions, and judgments made or rendered by the court, which had already been copied upon the records of the clerk, to wit, in his journal or elsewhere, and he paid for making the record thereof..... $54.75

(c) Disallowances of the excess of claimant's charges above 15 cents per folio, counting the total record of the case as one document to be counted continuously from beginning to end, the claimant having charged each entry of any transaction in said record as at least one folio. Claimant has been paid all that he would be entitled to by the Treasury method of accounting, and has been disallowed..... $32.30

Item 8. For administering oaths to thirty-nine witnesses for defendants before testifying in various cases, at 10 cents each. $3.90

Item 9. For administering twenty-four oaths to persons summoned to serve as jurors as to their qualification to sit as jurors in a particular case, at 10 cents each..... $2.40

Item 10. For recording on the court records the memorial of the Milwaukee bar on the death of Judge Gilson, 16 folios, at 15 cents per folio..... $2.40

Item 11. For making dockets, indexes, taxing costs, &c., in cases where issue was joined by entering plea of not guilty and afterwards entering said plea withdrawn and entering plea of guilty, at $2.00 in each case, $1.00 allowed and $1.00 now claimed. $20.00

These cases have been finally disposed of.

Included in the above item are three classes of services, viz:

(a) One cases where a motion to quash the indictment was filed and the case was disposed of by the order allowing said motion..... $1.00

12 (b) Nine cases in which defendants at first pleaded not guilty, and at a later day, with no steps or proceedings intervening, withdrew such plea, plead guilty and judgment was entered upon the plea of guilty.

(c) Ten cases where the defendant pleaded not guilty and thereafter at a subsequent day, with no intervening proceedings, a nolle prosequi was entered.

Item 12. For entering and recording separate orders of court, empanneling of jury, motion to quash indictment, and motion for judgment in various cases, one folio each, at 15 cents per folio..... $76.30

Included in said amount are disallowances amounting to $62.30 for services where the claimant has entered two or more transactions in the same case and at the same time, the entries of the several transactions aggregating not more than one folio in each case and has charged for each of the transactions as a separate folio, the accounting officers insisting that he should be allowed but for the folioage on a continuance, counting all of the words in the several entries made at the same time. Claimant has been paid all that he would be entitled to upon the method of counting adopted by the accounting officers and has been disallowed in excess thereof the sum of $62.30.

Item 13. For making a record of the names of jurors with their residences, as drawn by the jury commissioner, at 15 cents per folio..... $2.80

Item 14. For making judgment roll in a case tried and disposed of, four folios, at 15 cents per folio..... $0.60

It is the practice of the court to make this judgment roll.

Item 15. For entering order of court directing the clerk as to what disposition to make of the money received for fines in seven cases, one folio each, at 15 cents per folio..... $1.05

Item 16. For filing thirteen duplicate certificates of deposit of the bank for fines paid in to the credit of the Treasurer of the United States..... $1.30

The original is sent to the Treasurer of United States.

Item 17. Abandoned.

Item 18. Abandoned.

Item 19. Abandoned.

CONCLUSIONS OF LAW.

1. The claimant should recover upon items Nos. 1, 3, 4, 6, 7, 8, 11, 13, 14, 15, and 16, $165.10.

2. The claimant should not recover upon the remaining items.

The court filed no opinion in this case.

13 IV.—*Judgment of the court.*

At a Court of Claims held in the city of Washington on the 27th day of April, A. D. 1896, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant and do order, adjudge, and decree that the claimant, Edward Kurtz, do have and recover of and from the United States the sum of one hundred and sixty-five dollars and ten cents ($165.10).

BY THE COURT.

14 V.—*Application for and allowance of appeal.*

EDWARD KURTZ
v. } 18704.
THE UNITED STATES.

From the judgment rendered in the above-entitled cause, on the 27th day of April, 1896, in favor of the claimant, the defendants, by their Attorney-General, on the 16th day of May, make application for and give notice of an appeal to the Supreme Court of the United States.

J. E. DODGE,
Asst. Atty. General.

Filed in open court and allowed May 18, 1896.

WILLIAM A. RICHARDSON,
Chief Justice.

15 In the Court of Claims.

EDWARD KURTZ
vs. } No. 18704.
THE UNITED STATES.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the

above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the judgment of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington this 21st day of May, 1896.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) Case No. 16307. Term No., 530. The United States, appellant, vs. Edward Kurtz. Court of Claims. Filed May 22nd, 1896.

164-49

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

164-49

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
EDWARD KURTZ. } No. 530.

APPELLANT'S BRIEF.

JOSHUA ERIC DODGE,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT, v. EDWARD KURTZ. } No. 530.

APPELLANT'S BRIEF.

During the period involved the claimant, Edward Kurtz, has been clerk of the circuit and district courts for the eastern district of Wisconsin, and commissioner of the circuit court as well. During the six years prior to the commencement of this suit he made his accounts both as commissioner and clerk, which received the formal approval of either the circuit or district judge, and which were transmitted to the Treasury Department and passed upon by the accounting officers. Certain items were disallowed by the accounting officers and the balance paid. Claimant now sues for the items disallowed, which are set forth, with the action of the Court of Claims thereon, in the findings of fact at pages 6 to 9,

inclusive, of the record. The classes of charges to which the attention of the court will be brought upon this appeal are as follows, the numbering of the items being taken from the findings of the Court of Claims:

Item 7, sub-item C. Disallowance of so much of charge for making final records of cases as exceeds the folioage of such records, ascertained by a continuous counting of all the words therein, instead of by treating each transaction entered therein as a separate document and to be counted as at least one folio.

Item 11, sub-item B. Docket fees claimed at $2 each in nine cases, where the defendant at first pleaded not guilty, and at a later day, with no steps or proceedings intervening, withdrew such plea, plead guilty, and judgment was entered upon the plea of guilty. The accounting officers allowed $1 in each case as for a case in which judgment was rendered without issue.

Item 11, sub-item C. Docket fees in ten cases charged at $2 each, where the defendant pleaded not guilty, and thereafter, at a subsequent day, with no intervening proceedings, a *nolle prosequi* was entered. The accounting officers allowed $1 in each case as for a case which was dismissed or discontinued.

Item 13. For making a record of the names of jurors, with their residences, as drawn by the jury commissioner, at 15 cents per folio.

Item 15. For entering order of court directing the clerk as to what disposition to make of the money received for fines in certain cases, one folio each, at 15 cents per folio.

Item 16. For filing 13 duplicate certificates of deposit of the bank for fines paid in to the credit of the Treasurer of the United States, $1.30.

The Court of Claims allowed to claimant all of these items. Claimant would not have exceeded his maximum in any of the years involved with these fees added to those he received.

ASSIGNMENT OF ERROR.

The appellant assigns as error the action of the Court of Claims—

I. In allowing sub-item C of item 7 (p. 8).

II. In allowing sub-item B of item 11 (p. 8).

III. In allowing sub-item C of item 11 (p. 8).

IV. In allowing item 13 (p. 8).

V. In allowing item 15 (p. 9).

VI. In allowing item 16 (p. 9).

VII. In rendering judgment in favor of the claimant for the sum of $165.10.

ARGUMENT.

I. The Government objects and assigns error upon the allowance made in item 7 of the findings, Subdivision C, for making final records of criminal cases, the difference between the number of folios ascertained by counting the words continuously through the record, and that ascertained by treating every separate step, order, or transaction included in such final record as at least one folio.

An illustration would be in such entries as the following. The clerk will include in his final record of the case, perhaps consecutively: "Indictment filed," "Defendant appeared and pleaded not guilty," "Defendant moved for a continuance," "Order of continuance granted." Upon this suppositious set of entries the clerk would charge for four folios, while the accounting officers insist that only the gross number of words included in all of the four transactions so recorded should be taken in ascertaining the amount of the fee. Claimant has been paid all that he would be entitled to by the Treasury method of folioing.

A rule of court requires—

> There shall be kept by the clerk as heretofore a criminal final record, in which shall be recorded the indictment or information and all recognizances, warrants, process (except writs of subpœna and proceedings thereunder), judgments, and other proceedings in every prosecution for violations of the criminal laws of the United States.

All of the orders, judgments, and directions of the court which are included in such a final record have also been recorded from day to day by the clerk in another book, known as the journal, for which he has been duly allowed and paid.

This fee, small in amount here, but based upon a difference between the accounting officers and clerks, as well as commissioners, throughout the United States, and aggregating each year a large amount of money, depends on the eighth subdivision of section 828 of the Revised Statutes: "For entering any return, rule, order,

continuance, judgment, decree, or recognizance, or drawing any bond, *or making any record*, certificate, return, or report, for each folio, 15 cents."

A folio is defined in section 854 to mean "one hundred words, counting each figure as a word. When there are over fifty and under one hundred words, they shall be counted as one folio, but a less number than fifty words shall not be counted except when the whole statute, notice, or order contains less than fifty words."

The charge here is, of course, in the language of the statute, "for making a record." This record is one which the clerk is not required to make until the case is finally disposed of, and which is therefore not interrupted as are his journal entries, but is a continuous record of the whole proceedings and papers in the case. There certainly seems to be no propriety in permitting him to charge for this continuous writing more than the 15 cents for each 100 words contained therein. It is not making a record of each of the acts done by the court or each order made by it; that record has already been made in the permanent journal of the daily proceedings. It is segregating all of those various steps so as to constitute a final record of each case by itself and is one single record in whole.

II. The next item to which the Government objects is the allowance of Item 11, Subitem B (p. 8), *for making dockets, indexes, taxing costs, etc., in nine cases in which defendants at first pleaded not guilty, and at a later day, with no steps or proceedings intervening, withdrew such plea, plead guilty, and judgment was entered upon the plea of*

guilty. The controversy arises from the fact that claimant charged a fee of $2 in each case, and the accounting officers allowed him but $1 in each case.

A docket fee is provided for in subdivisions 10, 11, and 12 of section 828, which are as follows:

> For making dockets and indexes, issuing venire, taxing costs, and all other services on the trial or argument of a cause where issue is joined and testimony given, three dollars.
>
> For making dockets and indexes, taxing costs, and all other services in a cause where issue is joined, but no testimony is given, two dollars.
>
> For making dockets and indexes, taxing costs, and other services in a cause which is dismissed or discontinued, or where judgment or decree is made or rendered without issue, one dollar.

The accounting officers contend, and have apparently uniformly ruled, that a criminal case in which there is no issue *at the time judgment is rendered* comes within the third paragraph and is a case in which judgment is rendered without issue and in which the fee is $1. Claimant, on the other hand, contends that the case comes within the previous paragraph, and is one in which issue is joined but no testimony is given.

It may be that there are words in each of the sections which serve to describe the condition of the case. It certainly is a case in which judgment is rendered without issue. It has been held that the docket fee is never earned in a case until that case is finally decided (*United States* v. *McCandless*, 147 U. S., 692, 694), which would seem to indicate that the fee depended on the rendition

of a final decision and should be measured by its then condition. Thus it is held that in a case removed from one division of the district to another no docket fee is chargeable until the final determination, although the relation to it of the particular clerk had fully terminated by the removal. (*Van Duzee* v. *United States*, 41 Fed. Rep., 571.) The district court for the northern district of Iowa has just held the clerk entitled to only the $1 fee in cases like this, in the case of *Van Duzee* v. *United States*, wherein judgment was rendered April 23, 1896, in which Judge Shiras in his opinion says:

> The condition in which the case stands when finally disposed of is the criterion for the fee to be charged. The fact that originally a plea of not guilty was entered does not affect the question. * * * I hold, therefore, that in criminal cases which are disposed of upon a plea of guilty, the fee to be charged is $1, even though it be true that originally a plea of not guilty was entered, but which was withdrawn before final action in the case.

III. The next item is almost identical with the preceding, except that it seems more clearly to come within the language of the third, or $1, docket-fee paragraph. It is sub-item C of item 11 (p. 8), namely, *for making dockets, indexes, etc., in ten cases where the defendant pleaded not guilty, and thereafter at a subsequent day, with no intervening proceedings, a nolle prosequi was entered;* the clerk having been allowed and paid $1 in each of those cases, now claims $1 additional, contending, as before, that they are causes in which issue was joined; the Government contending that they come within the

exact wording of the third paragraph as "causes which were dismissed or discontinued." The remarks with reference to assignment of error II (*supra*) dispose equally, if not more conclusively, of this item.

IV. The next item to which the attention of the court is desired is item 13 (p. 8), *for making a record of the names of jurors, with their residences, as drawn by the jury commissioner, 15 cents per folio.*

The attitude of the accounting officers seems to be that the duty of acting with the jury commissioner in drawing the jury has been imposed upon the clerk of court without compensation. This view is based upon a single sentence in *United States* v. *King* (147 U. S., 676, 678), where the court say:

> The clerk was not by this statute (21 Stat., 43) made a jury commissioner, but a new duty was imposed upon him as clerk, and no provision was made for his compensation.

This view of the accounting officers has been adopted by some of the courts, its last application having been in the case of Van Duzee in the northern district of Iowa, decided April 23, 1896, where were disallowed charges by the clerk for preparing and posting up notices of the time and place for drawing the juries for the several terms of court, and for filing such notices after the drawing had been made; also charges by the clerk for services in recording upon the book kept for the purpose the names and addresses of persons forming the jury list, and for entering the names upon the tickets placed in

the box from which the juries are drawn, Judge Shiras saying, in his opinion—

> These services are proper, but under the ruling of the Supreme Court in *United States* v. *King* (*supra*) it must be held that they are performed as a part of the general duties of the clerk, and as the fee bill makes no provision for compensation for such services, none can be allowed.

In view of this difference in Treasury practice, supported as it is by the decisions of some of the United States courts, from the decision of the Court of Claims in this case, it is deemed proper to submit the question for authoritative settlement by this court.

The question, of course, is whether the language of this court in *United States* v. *King* was meant to extend further than to the per diem charge then before the court, and, if not so intended, whether the recording of these names comes within any of the items of the fee bill, the only one suggested being that of making a record.

V. The next objection is to items 15 and 16 of the findings (p. 9).

Item 15. *For entering order of court, directing the clerk as to what disposition to make of the money received for fines in certain cases, one folio each.*

Item 16. *For filing thirteen duplicate certificates of deposit of the bank for fines paid in to the credit of the Treasurer of the United States.*

Subdivision 7 of section 823 provides compensation to the clerk "for receiving, keeping, and paying out money in pursuance of any statute, or order of court,

one per centum on the amount so received, kept, and paid." The construction and practice of the accounting officers has been to construe this provision as providing the entire compensation to the clerk for all acts performed by him in connection with the receiving, keeping, and paying out of any money. The work in connection with the orders of the court directing him what to do with money, and the preservation, inclusive of the filing, of his certificates of deposit, are certainly part of the work involved in this duty, and upon the Treasury practice should be deemed as paid for by the payment of the 1 per cent.

Certain analogies, more or less close, arise in the statute, such as the payment to district attorneys of a 2 per cent commission for all services in the trial of revenue cases (sec. 825), and the compensation of a district attorney under section 827 by an amount to be fixed by the Secretary of the Treasury, which have both been uniformly held by the accounting officers to be exclusive of any of the fees under the fee bill for specific acts in any cases of either class.

Again, the statute regulating the compensation of commissioners in civil rights cases (sec. 1986) provides that the commissioner shall be entitled in such cases to a fee of $10 for his services in each case, inclusive of all services incident to the arrest and examination. It was impliedly held in the *Southworth Case* (151 U. S., p. 179, and S. C., 161 U. S., 839) that where the case failed to proceed far enough to become "a case" so as to entitle the commissioner to his $10, nevertheless the different

method of compensation for this kind of service excluded any fees under the fee bill for detail services. The court did not announce this, but did not allow such fees, although it was strenuously contended by the claimants upon the argument that he should receive $1 each for issuing warrants.

The present claimant is much more modest than some other clerks in the selection of detail services for which to claim specific fees. Some are far more ingenious. In one case pending in the Court of Claims the clerk demands specific fees for "entering order for payment out of designated depository of court, of fines to the collector or United States depository, 15 cents;" "certifying such order of record, 15 cents;" "making certified order of payment for the collector or United States depository, 45 cents;" "filing and entering voucher, 25 cents," making a total aggregate of $1 of such fees upon every such payment of money. The field for the inventive genius of clerks to discover papers which may be made and filed and charged for in connection with this very simple act of receiving and paying out money is broad, and if the line drawn by the Treasury Department be relaxed a very considerable variety of such fees will come up for consideration.

All of which is respectfully submitted.

JOSHUA ERIC DODGE,
Assistant Attorney-General.

164-49

Office Supreme Court, U. S.
FILED.
OCT 3 1896
JAMES H. McKENNEY,
CLERK.

164-49

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
vs.
EDWARD KURTZ, APPELLEE. } No. 530.

Appeal from the Court of Claims.

BRIEF FOR APPELLEE.

CHARLES C. LANCASTER,
Counsel for Appellee.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, Appellant,
vs.
EDWARD KURTZ, Appellee. } No. 530.

Appeal from the Court of Claims.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

Fees of a Commissioner of the Circuit Court of the United States for the Eastern District of Wisconsin and of Clerk of the District and Circuit Courts for said district.

The court below found the following facts:

I.

"The claimant, Edward Kurtz, was a Commissioner of the Circuit Court of the United States for the Eastern District of Wisconsin from December 11, 1888, to June 30, 1894, and Clerk of the District and Circuit Courts for said district from July 1, 1891, to June 30, 1894, duly qualified and acting.

II.

During said period he made up his accounts for services rendered on behalf of the United States, duly verified, and presented them to the United States Court for approval in the

presence of the district attorney, and orders approving the same as being just and according to law were entered of record. Said accounts were then presented to the accounting officers of the Treasury Department for payment. Part was paid, but payment of items embraced in Finding III was refused.

III.

FEES OF COMMISSIONER.

Item 1. For drawing complaints of affiants on which to issue warrants of arrest, two folios each, at 20 cents per folio, $9 15

The State law requires complaints to be in writing.

Item 2. For making and entering orders on the recognizance or mittimus in the hands of the marshal for his authority to release the defendant or for fixing bail, one folio in each case, at 15 cents per folio..... $5 55

The marshal required the order as his authority to release the prisoner.

Item 3. For making copies of process to file in clerk's office in cases where defendants were held for court, at 10 cents per folio..... $1 00

Item 4. Per diem for examination and certificate in case of application for discharge of a poor convict under section 1042, Rev. Stats., February 28, 1889, at $5.00 per day, $5 00

This per diem was disallowed, as a per diem for the same day was charged and allowed for attendance on court as clerk.

Item 5. Per diems for hearing and deciding on criminal charges in sixteen separate cases where the proceedings consisted of taking bail and passing on the sufficiency thereof, after the case had been heard and decided by claimant and defendant committed to jail, and in three separate cases where the proceedings consisted of taking bail and passing on the sufficiency thereof where the defendants had been arrested on bench warrants after indictment and brought before claimant to take bail, 19 days, at $5.00 per day..... $95 00

Item 6. For filing 82 bills of costs in various cases, made and filed pursuant to section 983, Rev. Stats., at 10 cents each..... $8 20

Item 7. For recording in the final record books the entries and proceedings in various criminal cases, consisting of the indictment or information, warrants, recognizances, judgments, and other proceedings, as required by rule of court, at 15 cents per folio..... $112 10

The rule of court specifically directing and by virtue of which this service was performed, is as follows:

"District court of the United States for the eastern district of Wisconsin.

"Before the Honorable James G. Jenkins, judge of said court, November 3, 1890.

"There shall be kept by the clerk, as heretofore, a criminal final record-book, in which shall be recorded the indictment or information and all recognizances, warrants, process (except writs of subpœna and proceedings thereunder), judgments, and other proceedings in every prosecution for violations of the criminal laws of the United States."

That in said final record the claimant has copied and recorded at large all orders and judgments made by the court, all of which orders, judgments, and directions of the court are from day to day recorded by him in another book, known as the "journal."

That included in the services covered by said item 7 are three classes, viz:

(a) Disallowances of all charges for making final records in cases where a *nolle prosequi* was entered, for the reason that such record is deemed unnecessary..... $25 05

(b) Disallowances of all charges for recording in the final record-book orders, directions, and judgments made or rendered by the court, which had already been copied upon the records of the clerk, to wit, in his journal or elsewhere, and he paid for making the record thereof..... $54 75

(c) Disallowances of the excess of claimant's charges above

15 cents per folio, counting the total record of the case as one document to be counted continuously from beginning to end, the claimant having charged each entry of any transaction in said record as at least one folio. Claimant has been paid all that he would be entitled to by the Treasury method of accounting, and has been disallowed..... $32 30

Item 8. For administering oaths to thirty-nine witnesses for defendants before testifying in various cases, at 10 cents each..... $3 90

Item 9. For administering twenty-four oaths to persons summoned to serve as jurors as to their qualification to sit as jurors in a particular case, at 10 cents each..... $2 40

Item 10. For recording on the court records the memorial of the Milwaukee bar on the death of Judge Gilson, 16 folios, at 15 cents per folio..... $2 40

Item 11. For making dockets, indexes, taxing costs, &c., in cases where issue was joined by entering plea of not guilty and afterwards entering said plea withdrawn and entering plea of guilty, at $2.00 in each case, $1.00 allowed and $1.00 now claimed..... $20 00

These cases have been finally disposed of.

Included in the above item are three classes of services, viz:

(a) One cases where a motion to quash the indictment was filed and the case was disposed of by the order allowing said motion $1 00

(b) Nine cases in which defendants at first pleaded not guilty, and at a later day, with no steps or proceedings intervening, withdrew such plea, plead guilty and judgment was entered upon the plea of guilty.

(c) Ten cases where the defendant pleaded not guilty and thereafter at a subsequent day, with no intervening proceedings, a *nolle prosequi* was entered.

Item 12. For entering and recording separate orders of court, empanneling of jury, motion to quash indictment, and

motion for judgment in various cases, one folio each, at 15 cents per folio $76 30

Included in said amount are disallowances amounting to $62.30 for services where the claimant has entered two or more transactions in the same case and at the same time, the entries of the several transactions aggregating not more than one folio in each case and has charged for each of the transactions as a separate folio, the accounting officers insisting that he should be allowed but for the folioage on a continuance, counting all of the words in the several enteries made at the same time. Claimant has been paid all that he would be entitled to upon the method of counting adopted by the accounting officers, and has been disallowed in excess thereof the sum of $62.30.

Item 13. For making a record of the names of jurors with their residences, as drawn by the jury commissioner, at 15 cents per folio $2 80

Item 14. For making judgment roll in a case tried and disposed of, four folios, at 15 cents per folio $0 60

It is the practice of the court to make this judgment roll.

Item 15. For entering order of court directing the clerk as to what disposition to make of the money received for fines in seven cases, one folio each, at 15 cents per folio $1 05

Item 16. For filing thirteen duplicate certificates of deposit of the bank for fines paid into the credit of the Treasurer of the United States $1 30

The original is sent to the Treasurer of United States.

Item 17. Abandoned.

Item 18. Abandoned.

Item 19. Abandoned."

R., pp. 6, 7, 8 and 9.

Judgment was entered for all the above items except items 2, 5, 9, 10 and 12, which were rejected, and as the claimant has no right of appeal, these items cannot be considered.

Of the items allowed by the Court of Claims, the appellant appeals only on the allowance of sub-item C of item 7 (R., p. 8), sub-items B and C, of item 11 (R., p. 8), item 13 (R., p. 8), item 15 (R., p. 9), and item 16 (R., p. 9), and concedes the allowance of the rest of the items.

ARGUMENT.

1. The accounts upon which this suit is based were approved by the court as required by the act of February 22, 1875, 18 Stats., 333. Such approval is *prima facie* evidence of the correctness of the items of these accounts, and in the absence of clear and unequivocal proof of mistake on the part of the court, it should be conclusive.

U. S. *vs.* Jones, 134 U. S., 483.
Approved in U. S. *vs.* Ewing, 140 U. S., 142.
U. S. *vs.* Barber, 140 U. S., 177.

It is contended by the appellee that the appellant has failed to show any clear and unequivocal mistake on the part of the court in approving the fees herein claimed.

2. Item 7, sub-item C. This is a claim for folio fees for making final records in criminal cases finally disposed of.

The rule of court specifically directing and by virtue of which this service was performed is as follows:

"There shall be kept by the clerk, as heretofore, a criminal final record book, in which shall be recorded the indictment or information and all recogizances, warrants, process (except writs of subpœna and proceedings thereunder), judgments and other proceedings in every prosecution for violations of the criminal laws of the United States."

The appellee has strictly obeyed this rule of court, which was binding on him, as evidenced by the approval of his accounts by the court. U. S. *vs.* Van Duzee, 140 U. S., 177. In making these final records the appellee charged the number of folios in each paper or order separately, and not for the number of folios contained in the final record when completed as one paper. The contention in this appeal is that

the latter, and not the former, is the legal method for ascertaining the number of folios. The appellee claims that each separate and distinct paper or order is counted separately as recorded, and the number of folios is ascertained by the rule prescribed by section 854, Rev. Stats., as follows:

"The term folio, in this chapter, shall mean one hundred words, counting each figure as a word. When there are over fifty and under one hundred words, they shall be counted as one folio; but a less number than fifty words shall not be counted except when the whole statute, notice or order contains less than fifty words."

The aggregate of the folios so found is the number of folios in the record.

Section 828, Rev. Stats., par. 8, provides: "For entering any return, rule, order, continuance, judgment, decree or recognizance, or drawing any bond, or making any record, certificate, return, or report, for each folio, 15 cents."

The evident design of the Statute was to allow separately the number of folios contained in each paper or order.

This construction has been uniformly sustained by the courts in every case reported. In Cavender *vs.* Cavender, 10 Fed. Rep., 829, the court in construing section 828, par. 8, says:

"It should be remarked that when an original entry of an order is made, though less than a folio, it is chargeable as a folio, each entry of a kind standing by itself, distinct from all others."

This identical question was decided in favor of the clerk in the case of Marvin *vs.* U. S., 44 Fed. Rep., 409. The court said: "The next question arises upon fees for final records in criminal cases. The Treasury Department allows for four folios in each case and rejects the excess above that number. *There can be no such arbitrary rule for the payment of records*, some of which are necessarily voluminous. The length of the record varies with the nature of the indictment, and there is no propriety in a rule which limits the payment of the recording of 50 folios to 60 cents, the fee for recording 4 folios."

This case was appealed by the Attorney General to this court, and the appeal was dismissed on his motion at the October term, 1892, No. 667, thereby admitting the correctness of the ruling of the court below on the very question now at issue.

The same question was also decided in favor of the clerk in Erwin *vs.* U. S., 37 Fed. Rep., 492, and no appeal was taken by the Attorney General to this court.

The decision of Judge Speer is clear and convincing. Referring to section 854, Rev. Stats., the court says:

"Here is express authority in the Statute for the counting of each separate and distinct order or other separate proceeding in the record separately. If an order contained less than 50 words, how could it be counted a folio, unless it be counted separately? If an order contained 425 words, how can it be counted as only 4 folios, unless it be counted separately? And the counting of each separate and distinct order, notice, or statute separately implies that the other independent proceedings should be counted separately also. This would follow from the sequence of the proceedings on the record. And this has been expressly decided. Cavender *vs.* Cavenden, 10 Fed. Rep., 828. To illustrate: Suppose a record was made up of the following proceedings:

Indictment	1,280	words,	13	folios.
Order for capias	25	"	1	"
Capias	483	"	5	"
Order fixing bail	30	"	1	"
Recognizance	442	"	4	"
Plea	18	"	1	"
Order for jury	15	"	1	"
Jury panel	36	"	1	"
Verdict	10	"	1	"
Sentence	110	"	1	"
	2,449	"	29	"

"In such a case there would be 29 folios in the record—not 24. And this appears to be the general rule for measuring work done by printers, clerks and stenographers. The reason of the rule is found in the fact that the chirographist can copy one uniform and continuous piece of manuscript with

much greater facility, and in less time than he can copy any number of separate and distinct papers aggregating the same number of words, *but which he has to handle, select, arrange, and appropriately head, as he concludes one and passes to another.*"

This interpretation of the Statute has been sustained by all the courts of the United States in their approval of the accounts of clerks since the passage of the act of of February 26, 1853. The objection that some of the orders and other proceedings had been previously entered upon the journal is overruled in Fuller *vs.* U. S., 58 Fed. Rep., 332, item 2.

3. Item 11, sub-item B (R., p. 8), for making dockets, indexes, taxing costs, &c., in nine cases in which defendants at first pleaded not guilty, and at a later day, withdrew such plea, plead guilty, and judgment was entered upon the plea of guilty. The appellee charged a docket fee in each case of $2, and the accounting officers disallowed $1 in each case, which is now claimed under par. 11, of section 828, Rev. Stats., which provides: "For making dockets and indexes, taxing costs and all other services in a cause where *issue is joined, but no testimony* is given, $2.00.

The appellant contends that only $1 is chargeable under par. 12, which provides: For making dockets and indexes, taxing costs and other services in a cause which is dismissed or discontinued, or where judgment or decree is made or rendered *without issue*, $1.00.

The main and controlling question is, Was issue joined at any stage of the proceedings? If it was, it is immaterial how the case was finally disposed of. The Statute does not say that issue must be joined at the final disposition of the case to entitle the clerk to a docket fee of $2. On the contrary, the Statute positively directs that a docket fee of $3 shall be allowed in cases where *issue is joined and testimony given;* $2 where *issue is joined, but no testimony is given,* and where the case is dismissed or discontinued *without issue*, $1.00.

The principle of the Statute upon which these docket fees are allowed is that in cases where issue is joined and testimony given, and in cases where issue is joined and no testimony is given, at any stage of the trial, there is more work for the clerk than in cases where no issue is joined at all in any state of the case, but after being docketed and indexed the case is dismissed or discontinued.

The evident design of the Statute is to make the fact of *issue joined and testimony given*, or *issue joined and no testimony given*, at any stage of the case, the *criterion* or *test* upon which the docket fee is chargeable. Take a case where issue is joined and testimony given and the jury fail to agree, and a new trial is ordered, subsequently the case is finally disposed of by either a plea of guilty or a *noll pros.* What would be the proper docket fee? Certainly not $2, for issue was joined and testimony given, and not $1 for the same reason.

If this be true, it follows as a legal sequence that in a case where *issue is joined*, but no testimony is given, and subsequently the case is finally disposed of by either a plea of guilty or a *noll pros.*, the proper fee is $2 and not $1. And this is the case at bar.

The fact that no proceedings were taken between *issue joined* by plea of not guilty and the final disposition of the case by plea of guilty is no fault of the clerk. His fee of $2 attached when issue was joined and no testimony given, and could not be defeated by any subsequent disposition of the case.

The condition in which the case stands when finally disposed of is *not* the criterion for the fee to be charged.

In the case of Van Duzee *vs.* U. S., 73 Fed. Rep., 796, cited by the appellant, Judge Shiras decides otherwise, but it is submitted that the reasoning of the court is not only unsound but contradictory.

To illustrate. The judge, at bottom of p. 796, says: "Thus if, in a criminal case, a plea of guilty should be entered, but subsequently the court permitted the defendant to withdraw

such plea and to enter a plea of not guilty, and upon the issue thus joined a trial should be had, and testimony should be introduced, I entertain no doubt the clerk could rightfully charge a fee of $3 upon the ground that the amount of the fee, lawfully chargeable, depends upon the mode in which the case was finally disposed of." The fallacy of this reasoning is clearly apparent. Suppose in the case cited the jury failed to agree and a new trial was ordered, subsequently the defendant again entered a plea of guilty, and the case finally disposed of, could it be contended that because the case ended on a plea of guilty the clerk was only entitled to a docket fee of $1 after all the labor performed by the clerk in perhaps a lengthy trial, where the daily proceedings were numerous, for which the clerk could not be compensated except by the docket fee of $3? Such, however, would be the conclusion of Judge Shiras.

On the contrary, it is submitted that the uniform practice of the Treasury Department in favor of appellee's contention since the act of 1853 up to 1891, when these docket fees were disallowed, and the judgment of the Court of Claims in this case, are founded upon the better reason and construction.

4. Item 11, sub-item C (R., p. 8). The question of construction involved in this sub-item is identical in principle with that in sub-item B last above, and the same argument applies.

5. Item 13 (R., p. 8). For *making a record* of the names of jurors with their residences, as drawn by the jury commissioner, at 15 cents per folio.

In the King case, 147 U. S., 681, this court decided that the clerk was not entitled to per diem services in the drawing of juries, or for such services as are not taxable, as orders, certificates or the like, under section 828, fixing the compensation of clerks.

The service here is for *making a record* which is specifically taxable under par. 8 of section 828, "for *making any record*, certificate, return, or report, for each folio, 15 cents."